LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 16 1964
JOHN F. DAVIS, CLERK

No. 920

IN THE

Supreme Court of the United States

THOMAS C. DOERR,
Petitioner,

vs.

WILLIAM F. ELDER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

ROBERT L. STERN
231 South La Salle Street
Chicago, Illinois

MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT

CLARENCE A. DAVIS
525 Stuart Building
Lincoln 8, Nebraska

DAVIS, THONE, BAILEY
& POLSKY

McCORMICK & HENDERSON INC., CHICAGO, ILL.

TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	3
The Statutory and Decisional Background	3
The Facts of the Case	5
The Presentation of the Federal Questions	7
Subsequent Legislation	8
Reasons For Granting The Writ	9
Conclusion	20
Appendix A—Nebraska Constitutional and Statutory Provisions Involved	App. 1
Appendix B—Opinion below	App. 10
Appendix C—Excerpts from Motion for Rehearing in the Supreme Court of Nebraska which Present the Federal Questions	App. 25

TABLE OF CASES

PAGE

A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 17

Breithaupt v. Abram, 352 U.S. 432, 436-7 10

Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673, 677-8 ..... 8, 12

Brown v. Mississippi, 297 U.S. 278, 286 10

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374 15

Cline v. Frink Dairy Co., 274 U.S. 445, 463 17

Connally v. General Construction Co., 269 U.S. 385, 391 17

Coombes v. Getz, 285 U.S. 434 17

Ettor v. Tacoma, 228 U.S. 148 17

Ferguson v. Skrupa, 372 U.S. 726 12

Fleuti v. Rosenberg, 302 F.2d 652 (C.A. 9, 1962), vacated on other grounds, 374 U.S. 449 17

Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338 17

Great Northern R. Co. v. Sunburst Oil Co., 287 U.S. 358, 367 8

Hansberry v. Lee, 311 U.S. 32, 40 12

Ingersoll v. The State, 11 Ind. 464 (1858) 10, 14

International Harvester Co. v. Kentucky, 234 U.S. 216 19

Jordan v. De George, 341 U.S. 223, 231-32 17

PAGE

Lang v. Mayor, 74 N.J.L. 455, 68 Atl. 90 (1907) 10

Lutwin v. State, 97 N.J.L. 67, 117 Atl. 164 (1922) 10

Lynch v. United States, 292 U.S. 571 17

McNish v. Grand Island Finance Company, 164 Neb. 543, 83 N.W.2d 13 (1957) 4

Milliken v. Meyer, 311 U.S. 457, 463 10

Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320 8

Missouri Utilities Co. v. City of California, 8 F. Supp. 454, 468 (W.D. Mo. 1934) 15, 16

Norton v. Shelby County, 118 U.S. 425 ..... 15, 16

Palko v. Connecticut, 302 U.S. 319, 328, 325 10

Powell v. Edwards, 162 Neb. 11, 19, 75 N.W.2d 122, 127 (1956) 3

Raley v. Ohio, 360 U.S. 423, 426, 438 ..... 10, 12, 13, 17

Rochin v. California, 342 U.S. 165, 169-173 ..... 10, 12

Saunders v. Shaw, 244 U.S. 317, 320 8

Scull v. Virginia, 359 U.S. 344, 353 12

Sessums v. Botts, 34 Tex. 335, 349 (1871) 10

Shelley v. Kraemer, 334 U.S. 1, 14 12

Smith v. Cahoon, 283 U.S. 553, 564-565 19

Stanton v. Mattson, 175 Neb. 707, 123 N.W.2d 844 8

State v. Associates Discount Corp., 168 Neb. 298, 308, 96 N.W.2d 55, 65, *et seq.* (1959) 4

State v. Godwin, 123 N.C. 697, 31 S.E. 221 (1898) 10

Texas Co. v. State, 31 Ariz. 485, 502, 254 Pac. 1060, 1065 10

PAGE

Trailmobile, Inc. v. Hardesty, 173 Neb. 46, 112 N.W. 2d 535 (1961) 4

United States v. Cardiff, 344 U.S. 174 18

United States v. Realty Co., 163 U.S. 427, 437-438 15

Warring v. Colpoys, 122 F.2d 642, 645-647 (C.A.D.C. 1941), cert. denied, 314 U.S. 678 15

Wood v. Commonwealth Trailer Sales, Inc., 172 Neb. 494, 110 N.W.2d 87 (1961) 4

STATE CONSTITUTION AND STATUTES

Nebraska Constitution (Art. III. § 18) ..... 6, App. 1

Nebraska Installment Loan Act, R.R.S. Neb. §45-137 ..... 3, 13-14 App. 1

Nebraska Installment Sales Act of 1959 R.R.S. Neb. § 45-301, *et seq.* ..... 4, 12-14, App. 3

§ 45-302 ..... 5, App. 3

§ 45-303 ..... 4, App. 4

§ 45-304 ..... App. 6

§ 45-305 ..... 5, App. 6

§ 45-310 ..... 5, App. 8

§ 45-311 ..... 5, App. 9

Nebraska Legislative Bills 811, 16, 17, 19, 11 (1963) 8

Nebraska Usury Law, R.R.S. Neb. § 45-101, 105 3

Interest Laws of State of Nebraska 18

MISCELLANEOUS

PAGE

Borchard, 45 Yale L.J. 1533-1534 ..... 15n

Federal Reserve Board, *Consumer Installment Credit*, Part I, Vol. 1, p. 68 (1957) 11

Nebraska Legislative Journal, November 19, 1963 p. 192 ..... 11, 14

Paul Smith, *Cost of Providing Consumer Credit*, 17 Journal of Finance 476, 479 (1962) 11

Warren, Regulation of Finance Charges in Retail Instalment Sales, 68 Yale L.J. 839, 840, 850-851 (1959) 3, 6, 11

IN THE

Supreme Court of the United States

No.

THOMAS C. DOERR,

Petitioner,

vs.

WILLIAM F. ELDER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

Petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Nebraska entered in the above entitled case on June 28, 1963, rehearing denied October 18, 1963.

Citations To Opinion Below

The opinion of the Supreme Court of Nebraska, printed as Appendix B hereto, *infra*, App. 10-24, is reported at 175 Neb. 483, 122 N.W. 2d 528.

Jurisdiction

The judgment of the Supreme Court of Nebraska was entered on June 28, 1963. A timely petition for rehearing was denied October 18, 1963. On December 31, 1963, Mr. Justice White extended the time to petition for certiorari to March 16, 1964. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since the validity under the United States Constitution of the application of a state statute is drawn in question.

Questions Presented

The Nebraska Supreme Court has held that the penalty and forfeiture provisions of the Nebraska Installment Loan Act of 1941, as amended, are violated by transactions made in conformance with the requirements of the Nebraska Installment Sales Act of 1959, which the court held to be invalid under the constitution of Nebraska. The question presented is whether application of these provisions of the Act of 1941 to transactions made in the form required by the Act of 1959 prior to the holding of invalidity violates the due process clause of the Fourteenth Amendment because:

(a) The effect is to entrap all persons who made their contracts in the language required by the 1959 Act into violation of the penalty and forfeiture provisions of the 1941 Act; and

(b) Persons of ordinary intelligence, reading the 1941 Act together with the 1959 Act and the Nebraska decisions, would not have understood that doing what the 1959 law required, under pain of criminal and civil penalties, subjected them to the penalties and forfeitures of the 1941 Act, with the result that the application of the latter to such transactions gave it and the Nebraska law as of that period a vague, indefinite and uncertain meaning not consistent with the due process clause.

Constitutional and Statutory Provisions Involved

This case principally involves the due process clause of the Fourteenth Amendment. The pertinent provisions of the Nebraska constitution (Art. III, § 18) and statutes (R.R.S. Neb. §§ 45-137; 45-301, *et seq.*) are printed as Appendix A, *infra*, App. 1-9.

Statement

The Statutory and Decisional Background. The original Nebraska usury law (Neb. Laws 1879, p. 113, R.R.S. Neb. § 45-101) provided for 9% maximum interest on loans, with a loss only of the interest if the percentage allowed was exceeded. § 45-105. In 1941 this was supplemented by the Installment Loan Act (Laws 1941, c. 90, R.R.S. Neb. § 45-114, *et seq.*). Section 45-137 of this statute, as amended, permitted higher interest rates on loans not exceeding $300, but not in excess of 9% for amounts over $300. In case of violation, the loan contract was declared void, and the violator was subject to loss of both principal and interest, whether collected or uncollected, as well as to a fine of not less than $100 or imprisonment of not more than 6 months, or both. § 45-137. In addition to forfeiting the right to payment, the violator cannot recover the property sold.

This law on its face applied only to loans. Under the traditional time price doctrine applied in Nebraska (before these cases) and in most of the state and federal courts, an installment sale at a price higher than the cash price is not deemed to be a loan, and is lawful "though the difference in prices may exceed lawful interest for a loan." *Powell* v. *Edwards*, 162 Neb. 11, 19, 75 N.W.2d 122, 127 (1956), and cases cited; Warren, *Regulation of Finance Charges in Retail Instalment Sales*, 68 Yale L.J. 839, 841 (1959). In determining whether the Installment Loan Act

was applicable, the Nebraska Supreme Court has, however, engrafted on the general rule a requirement that, looking through form to substance, the transaction must be a good faith time sale and not a loan. *Powell* v. *Edwards, supra; State* v. *Associates Discount Corp.*, 168 Neb. 298, 308, 96 N.W.2d 55, 65, *et seq.* (1959).[1] As a consequence of the resulting uncertainty as to whether any particular sale would be deemed a valid time sale or a loan subject to the penalties of the Installment Loan Act,[2] the Nebraska legislature passed the Installment Sales Act of 1959 (R.R.S. Neb. §45-301, *et seq.*). Section 45-303 provided:

> "Each retail installment contract shall be in writing, shall be signed by both the buyer and the seller and shall contain the following items * * *: (1) The cash sale price of the goods; (2) the amount of the buyer's down payment, and whether made in money or goods, or partly in money and partly in goods, including a brief description of any goods traded in; (3) the difference * * *; (5) the basic time price * * *; (6) the time price differential; (7) the amount of the time price balance * * *; (8) the number, amount and due date or period of each installment; and (9) the time sales price."

---

[1] An important distinguishing factor was whether "the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price." *State* v. *Associates Discount Corp.*, 168 Neb. 298, 309, 96 N.W. 2d 55, 65 (1959). As the Nebraska cases demonstrate, "the courts which have purported to look through the form of a credit sale to determine whether it is in substance a loan * * * look through form not to substance but merely to another kind of form." *Warren, supra*, 68 Yale L.J. at 849.

[2] Under the test of looking through form to substance, different results have been reached on substantially indistinguishable facts. Compare *Trailmobile, Inc.* v. *Hardesty*, 173 Neb. 46, 112 N.W. 2d 535 (1961) with *Wood* v. *Commonwealth Trailer Sales, Inc.*, 172 Neb. 494, 110 N.W. 2d 87 (1961), and the two installment sales in *McNish* v. *Grand Island Finance Company*, 164 Neb. 543, 83 N.W. 2d 13 (1957), one of which was held valid and one invalid.

"Time price differential" was defined in Section 45-302(8) to mean "the amount, as limited herein, to be added to the basic time price."

Section 45-305 provided for maximum time price differentials from $10 to $15 "per one hundred dollars per year" for used cars, depending upon the age of the car, and for different amounts for the installment sales of goods other than motor vehicles. Violation of the Act was made a misdemeanor punishable by fine of up to $500 or imprisonment for not more than 6 months or both. §45-310. In addition, if a seller or a finance company made any charges above those authorized, the contract was declared void and uncollectible

> "* * * as to (1) all of the excessive portion of the time price differential, (2) the first one thousand dollars on the time price differential authorized by section 45-305, and (3) the first four thousand dollars of the principal of the contract." §45-311.

The Facts of the Case. On March 31, 1962, plaintiffs bought a used 1959 Oldsmobile from an Omaha automobile dealer under a retail installment contract which was duly assigned to defendant-petitioner. The stipulation of facts states that the dealer advised plaintiffs that the cash price of the car would be $2,095, that the time sale price was $2352.96, and that the unpaid balance could be paid in 24 monthly installments of $70.54 each, to which plaintiffs agreed. The stipulation further stated:

> "(3) That the time price differential of $257.96 shown on said contract is less than the maximum time price differential authorized by the Nebraska Installment Sales Act on said transaction and is in excess of an amount equal to nine per cent per annum simple interest on the scheduled unpaid balances if each payment were made in the manner and at the time scheduled.

"(4) That no aspect of the transaction was misrepresented to plaintiffs by the dealer or its salesman. The sale was handled and the contract was executed in compliance with all requirements of the Nebraska Installment Sales Act."

After paying some of the installments due, plaintiffs refused to pay anything further, and defendant threatened to repossess the automobile and collect on the contract.

Plaintiffs thereupon brought this suit for declaratory judgment praying that the Installment Sales Act be declared violative of the Nebraska constitution and the contract of sale void, and that defendant be enjoined from collecting thereunder. Defendant, in answer, averred that the Installment Sales Act was valid, and that, even if it were not, the transaction was a legitimate time sale under Nebraska law and not subject to the Installment Loan Act which did not apply to time sales.

The District Court of Douglas County found the Installment Sales Act to be constitutional and dismissed the complaint. The Supreme Court of Nebraska reversed. It found the classifications in the Installment Sales Act with respect to the age of automobiles and between automobiles and other products[3] unreasonable and, therefore, in violation of Article III, §18 of the Nebraska constitution, which prohibits the passage of "special laws * * * regulating the interest on money."

The Court recognized that:

"The stipulation of facts upon which the case was tried * * * would ordinarily require a holding

[3] The Nebraska classification was in accord with that followed in many other states. "The most common type of statute recognizes the increased risk that attends the selling of used cars, and classifies motor vehicles in three or four age groups, with higher finance charges allowed for older models." Warren, *Regulation of Finance Charges in Retail Instalment Sales*, 68 Yale L.J. 839, 851 (1959), which cites the statutes of 19 states in support of the sentence quoted.

that the installment contract was a valid time sale made in good faith." (App. 14-15, *infra.*)

But the Court then declared (*ibid.*) that:

> "* * * the parties stipulated that the installment contract was made in conformity with all the requirements of the Nebraska Installment Sales Act."

Because of this stipulation, the Court found the contract to be unlawful. Its reasoning was that the provision in the 1959 Act limiting the time price differential to a certain number of dollars "per one hundred dollars per year" proved that the "time price differential" was (apparently as a matter of legislative intent) an interest charge, and that, therefore, any contract using the phrase required by the statute was a loan prohibited under the 1941 Act. Thus, *because* the contract used the phrase required by the 1959 law, it was unlawful under the 1941 law even though it would not have been otherwise.

The Presentation of the Federal Questions. Defendant thereupon petitioned for rehearing, alleging that the court was giving the words of a statute which if declared to be void operative effect to invalidate a contract otherwise valid, and that the action of the court depriving petitioner of his property was in violation of the due process and the equal protection clauses of the Fourteenth Amendment. Petition for Rehearing, pp. 4-7, 36-39, Appendix C, *infra*, App. 25-29. The petition pointed out that (p. 36):

> "These [federal] questions could not have arisen and did not arise until this opinion was written. Therefore, they could not have been presented any sooner."

It could not reasonably have been anticipated that the Nebraska Supreme Court would hold that conduct which would not otherwise have violated the 1941 law would be held inconsistent with that statute *only* because it com-

plied with the invalidated Act of 1959. Since this surprising decision created the federal question, the raising of the federal question in the petition for rehearing was timely. *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-8; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 320; *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358, 367; *Saunders* v. *Shaw*, 244 U.S. 317, 320. The pertinent portions of the petition for rehearing are attached hereto as Appendix C. (App. 25-29, *infra.*)

Subsequent Legislation. Shortly after the decision in this case, the Nebraska legislature enacted Legislative Bill 811 which it was thought would correct the constitutional defects which the Nebraska Supreme Court had found in the 1959 Installment Sales Act. On October 18, 1963, the Nebraska Court held that this statute was invalid because it allowed retail sellers to charge a different rate of interest than other persons, because there was no basis for differentiating between sellers of motor vehicles and other sellers, and because the bill was limited to installment contracts in which the seller retained title to or a lien upon the goods sold as security. *Stanton* v. *Mattson*, 175 Neb. 767, 123 N.W.2d 844.

In November, 1963 the Nebraska legislature met in special session and enacted a series of bills dealing with this problem. Legislative Bills 16, 17, 19, and 11. These laws substantially changed the law of Nebraska for the future, and also specifically provided for the retroactive reduction of civil penalties applicable to transactions held to constitute loans at excessive interest in connection with installment sales, and for the retroactive elimination of the forfeitures and penalties imposed upon persons who had complied with the 1959 Act. The validity of this legislation has been challenged, and one appeal from a decision sustaining the retroactive provisions was argued in the Nebraska Supreme Court on March 5, 1964. *Davis* v. *G.M.A.C.*, filed December 11, 1963. If the retroactive pro-

visions of the new legislation are upheld, the question which petitioner here wishes to bring to this court will lose its significance, and this petition for certiorari (and also the appeal in *G.M.A.C.* v. *Mackrill*, No. 921) will be withdrawn. If, on the other hand, the Nebraska Supreme Court invalidates the amendatory and curative legislation, all possible remedy in Nebraska will have vanished, and review by this Court will become essential if the unconstitutional forfeitures are to be avoided.[4]

Reasons For Granting The Writ

What Nebraska, through its legislature and Supreme Court, does with its usury laws as a matter of substantive law is Nebraska's business. The vice in what the Nebraska Supreme Court has done here is the *retroactive* subjection of most retail installment sales in Nebraska since 1959 to forfeiture of the property sold because the sellers' compliance with the 1959 act was viewed as a violation of the 1941 law which the sellers could not have been expected to know was applicable. The evil is greater than that of the merely vague and indefinite statute, which violates due process because men must "guess" as to whether their conduct is unlawful (see cases cited at pp. 17-19, *infra*), for then, at least, there is notice of *possible* violation. *No one* reading the Nebraska statutes would have thought that his compliance with the Act of 1959 would in itself establish illegality under the Act of 1941.

We do not have merely the imposition of a penalty for violation of a prior statute after a decision that a subsequent exculpatory law is invalid, though that in itself would be "the height of injustice," as the cases cited at the bot-

[4] If the Nebraska Supreme Court has not determined the validity of the new legislation by the time the brief in opposition is due, petitioner will move that this Court defer action on the petition until the Nebraska decision is rendered.

tom of the page hold. Here there is in addition the use of the fact of compliance with the statute held invalid to put the imprimatur of illegality upon conduct which would not otherwise have violated the preexisting law.

This subjection of persons to the penalties of the 1941 act because they obeyed the 1959 law in good faith deprives them of their property in a manner which "shocks the conscience" and is contrary to "the traditional notions of fair play and substantial justice implicit in due process." *Milliken* v. *Meyer*, 311 U.S. 457, 463; *Palko* v. *Connecticut*, 302 U.S. 319, 328, 325; *Brown* v. *Mississippi*, 297 U.S. 278, 286; *Rochin* v. *California*, 342 U.S. 165, 169-173; *Breithaupt* v. *Abram*, 352 U.S. 432, 436-7. This Court has held that the due process clause does not "sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available * * *". *Raley* v. *Ohio*, 360 U.S. 423, 426, 438. "* * * [I]t would be the height of injustice for the state to penalize, either by criminal process or civil action, one of its citizens for obeying a law which on its face was adopted in a constitutional manner, but which was, after such obedience by the citizen, held to be unconstitutional. * * * [T]he citizen who obeys such a law cannot be penalized [in that case civilly] by the state for so doing." *Texas Co.* v. *State*, 31 Ariz. 485, 502, 254 Pac. 1060, 1065 (1927). See to the same effect *Lang* v. *Mayor*, 74 N.J.L. 455, 68 Atl. 90 (1907); *State* v. *Godwin*, 123 N.C. 697, 31 S.E. 221 (1898); *Lutwin* v. *State*, 97 N.J.L. 67, 117 Atl. 164 (1922); *Sessums* v. *Botts*, 34 Tex. 335, 349 (1871); *Ingersoll* v. *The State*, 11 Ind. 464 (1858), discussed *infra*.

As has been pointed out, when the 1941 act is violated, the seller or his assignee not only forfeits his right to repossess the property sold and to collect the unpaid installments; he may also be compelled to repay any part of the price already collected. The result of the decision below,

therefore, is to forfeit the entire value of substantially all products sold on a time basis in Nebraska since the enactment of the 1959 act.[5] The amount of this forfeiture is reflected in the

> "* * * conservative estimate that a minimum of $300,000,000 to $500,000,000 a year of this paper is held by various merchants, banks and finance institutions. When it is considered that under the decisions of the Nebraska Supreme Court the buyer is entitled to recover amounts previously paid within the period of the statute of limitations, the amounts which potentially are involved in this situation could amount to more than one billion dollars."

Statement in Nebraska Legislative Journal of November 19, 1963, p. 192.

The magnitude of the economic consequences of the decision below, and the tremendous number of transactions affected thereby, combined with its shocking unfairness as applied to prior transactions undertaken in the form required by the 1959 law, demonstrate that the federal question presented is substantial and important enough to justify review by this Court.

A. "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amend-

---

[5] Invalidity would, of course, attach only where the time price differential exceeded the 9% simple interest allowed under the 1941 act for installment loans over $300. But the 1959 act permitted a higher charge for retail installment sales, and, as a result, most financing thereafter was at the rate therein authorized, or at least at rates higher than those permitted in the 1941 law. The 9% simple interest rate is economically inadequate for this type of consumer credit as the court below conceded. Appendix B, *infra*, App. 15. See Paul Smith, *Cost of Providing Consumer Credit*, 17 Journal of Finance 476, 479 (1962); Warren, *Regulation of Finance Charges in Retail Instalment Sales*, 68 Yale L.J. 839, 850 (1959); Federal Reserve Board, *Consumer Installment Credit*, Part I, Vol. 1, p. 68 (1957).

ment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment." *Shelley* v. *Kraemer*, 334 U.S. 1, 14; *Hansberry* v. *Lee*, 311 U.S. 32, 40; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 680. See also *Raley* v. *Ohio*, 360 U.S. 423.

As in the *Brinkerhoff* case, "we are not now concerned with * * * the accuracy of the state court's construction of" its constitution,[6] but with whether petitioner "has been accorded due process in the primary sense." 281 U.S. at 681. In that case the question was whether a party was accorded "an opportunity to present its case and be heard in its support." (*Ibid.*) Here, the question is whether a party can be subjected to penalties for conduct which he was not reasonably warned would be unlawful. "This Court has often held that fundamental fairness requires that such reasonable certainty exist", that a person not be punished "for a crime he could not with reasonable certainty know he was committing." *Scull* v. *Virginia*, 359 U.S. 344, 353.[7]

The Nebraska Supreme Court has here imposed liability under the 1941 statute in a manner which "offend[s] those canons of decency and fairness" (*Rochin* v. *California*, 342 U.S. 165, 169-173) embodied in the Fourteenth Amendment. The Installment Sales Act of 1959, a law enforceable both by criminal and civil sanctions, was, on its face,

---

[6] This case does not involve the substitution of the judgment of this Court for that of the representatives of the people of Nebraska as to the reasonableness of a rule of substantive law. Cf. *Ferguson* v. *Skrupa*, 372 U.S. 726. Here it was the Supreme Court of Nebraska which did not agree with the reasonableness of the legislative classification, a point which, of course, is not involved here.

[7] Conduct here held to violate the Installment Loan Act was subject to criminal penalties as well as to the civil forfeitures involved in these cases.

binding upon all retail installment sellers in the State of Nebraska. It required the statement of a "time price differential." And although the Nebraska act did not *require* that this differential exceed the 9% allowed (as interest) under the Installment Loan Act, it permitted higher percentages which, of course, were generally availed of since as a practical matter the cost of allowing credit on sales in the price ranges here involved substantially exceeded 9 per cent simple interest. See citations in fn. 5, *supra*, p. 11.

The holding below that from 1959 to 1963 the use of the phrase "time price differential" required by the 1959 law subjected petitioner and all others similarly situated to the 1941 act had the effect of trapping all retail installment sellers and finance companies in Nebraska into forfeiting the goods sold on a time basis. Such entrapment for obeying the 1959 law and exercising a right which the legislature had clearly stated was available is "most indefensible." *Raley* v. *Ohio*, *supra*, 360 U.S. at 438. Just as in *Raley* the legislative commission's erroneous advice or assumption that the privilege against self-incrimination was available to the witnesses was contrary to an immunity statute not recognized as applicable until the State Supreme Court spoke, so here the legislature's requirement that an installment sales contract specify the amount of the "time price differential" was embodied in a law not recognized as unconstitutional until the State Supreme Court so held. In each case, the State court held that conduct which the State authorities (in the one case the legislature, in the other a legislative commission) erroneously had represented to be lawful was subject to penalty under preexisting laws not known to be applicable until the court so declared.

A difference between the cases is that the 1959 Nebraska law here held invalid imposed criminal and civil penalties for failing to state a "time price differential", the very

conduct which has been held to subject petitioner to the earlier 1941 statute. In *Raley* the refusal of the defendants to testify, for which they were convicted, was obviously not thought by them or anybody else to have been required by anything in Ohio law. In addition, there would seem to have been less excuse for unawareness of the Ohio immunity statute than of the unconstitutionality of Nebraska's Installment Sales Act, which was similar to laws in effect in many other states (see fn. 3, p. 6, *supra*). The reliance on the error of the legislature here was therefore as justifiable as reliance on the error of the Ohio legislative commission. Thus, the entrapment in this case, which penalizes for conduct reasonably not thought to be unlawful, violates the due process clause for the same reasons as did the entrapment involved in *Raley*.[8]

Ingersoll v. *The State*, 11 Ind. 464 (1858), involved a similar problem. The Indiana legislature had repealed an act prohibiting the sale of liquor at retail, but the repealing law was held to be unconstitutional. In reversing a conviction for violation of the original statute after the invalid repeal, the Indiana Supreme Court said, in language equally applicable here (p. 465):

> "Under such circumstances, it would be unjust—would be a violation of all principles of right—to hold that the act of 1853 was all this time in force, and the people incurring its penalties. It would make the law a 'concealed trap to catch victims.'"

See also cases cited on p. 10, *supra*.

---

[8] The penalty in the *Raley* case was criminal; under the Nebraska Installment Loan Act it can be civil or criminal. But, as a practical matter, the potential loss of the entire value of all products sold on a time basis between 1959 and 1963 for each dealer or finance company operating in Nebraska far outweighs in dollars and can be far more ruinous than any criminal fines which could conceivably be imposed. For example, "two of the large farm machinery dealers combined hold an estimated amount [of installment sales paper] of $16,000,000." Nebraska Legislative Journal, November 19, 1963, p. 192.

The businessmen subject to the installment sales regulation could not have been expected to conduct their affairs on the assumption that the 1959 act was invalid. "[A]lthough the citizen is presumed to know the law, he is not presumed to know that a statute, which even the Supreme Court will presume is constitutional, is unconstitutional." *Missouri Utilities Co.* v. *City of California*, 8 F.Supp. 454, 468 (W.D. Mo. 1934); *United States* v. *Realty Co.*, 163 U.S. 427, 437-438; *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374; *Warring* v. *Colpoys*, 122 F.2d 642, 645-647 (C.A.D.C. 1941), certiorari denied, 314 U.S. 678. Certainly he could not have been expected to know both that the law was unconstitutional and that obedience to its mandatory disclosure provisions without more would conclusively establish that the transaction was not a time sale but a loan subject to the limitations of the older penal statute.

It has often been stated, particularly in older cases, that a legislative act held unconstitutional is as if it never had been enacted. *Norton* v. *Shelby County*, 118 U.S. 425, is perhaps the leading case. But this Court recognized in the *Chicot County* case, 308 U.S. at 374, that:[9]

> "* * * It is quite clear, however, that such broad statements as to the effect of a determination of un-

[9] The Court cited with approval, *inter alia*, Professor Borchard's statement that:

> "Whereas formerly it was common to assume, with *Norton* v. *Shelby County*, that a statute held 'unconstitutional' was void *ab initio* and created no legal effects—except possible liability for those who acted under it—a more practical and just rule has in many instances had to be adopted. The statute is an operative fact, and until it is declared 'unconstitutional'—and there are many types of invalidity—it is unsafe to disregard it. Vested interests are created under it, positions are changed, often irretrievably. Considerations of common sense and equity have therefore developed a variety of rules to temper an assumed logic with justice, and to protect many interests that have arisen in reliance on such tainted statutes.", 45 Yale L.J. 1533-1534.

> constitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. . . . [I]t is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

While "generally speaking" it is true that an unconstitutional law is a nullity *ab initio*, that "is not always absolutely true." *Missouri Utilities Co. v. City of California*, *supra* at 467. Indeed, in this very case, the Nebraska court gave effect to the supposedly void statute by using its provisions as the premise for its holding that the contract here involved was a loan rather than a time sale. Foremost among the situations in which the generalization should not be given effect is that involved here—where a penalty has been imposed under a preexisting statute for compliance with a law which (prior to the invalidating decision) not only could reasonably be assumed to be lawful but which in itself imposed penalties for disobedience. In the usual case testing the constitutionality of a statute, the determination of invalidity eliminates a sanction but does not impose one.

The situation would have been different if the Nebraska Supreme Court had merely held invalid the contract authorized by the 1959 law; then, as was suggested in *Norton* v. *Shelby County* (118 U.S. at 454), a remedy in *quantum meruit* might have been available. In that case the Court indicated that if the defendants "obtained the property of others without right, they must return it to the true owners, or pay for its value." To impose civil forfeiture, as well as liability to criminal punishment, for obeying the law held to be invalid is to go to the opposite extreme. This, we submit, violates the due process clause.

Clearly for a legislature after the fact to impose penalties upon conduct authorized or required by a prior statute before its repeal or invalidation would be so unfair as to violate the Constitution, including the due process clause, apart from the *ex post facto* and contract clauses. *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338; *Ettor* v. *Tacoma*, 228 U.S. 148; *Coombes* v. *Getz*, 285 U.S. 434; *Lynch* v. *United States*, 292 U.S. 571. When the judiciary applies a penal statute to conduct authorized by the intervening invalid law, as it has done here, the consequence is as shocking to the conscience and therefore as contrary to due process.

B. The analogy to the principle pursuant to which statutes have been held to violate due process because of indefiniteness is close and striking. This Court has often held that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391. "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan* v. *De George*, 341 U.S. 223, 231-32. "The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation * * *." *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 463; *A.B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233; *Jordan* v. *De George*, *supra*; *Fleuti* v. *Rosenberg*, 302 F.2d 652 (C.A. 9, 1962), vacated on other grounds, 374 U.S. 449. Certainly it applies where the same act is subject to both criminal and civil penalties, as in the *Small* case and here. The same principle applies, perhaps even more clearly, where different statutory provisions contain "contradictory" or "misleading" commands. *Raley* v. *Ohio*, *supra*,

360 U.S. at 438 (where a seemingly clear statute conflicted with the position of a legislative commission); *United States* v. *Cardiff*, 344 U.S. 174. That is the situation here if the 1941 Nebraska law be construed, as it has been, to penalize conduct authorized and indeed required by the 1959 law.

It is true that neither the 1941 nor the 1959 law, if read alone, is indefinite on its face. But prior to June 28, 1963, the date of the decision below, no one would have suspected from a reading of these statutes together—and the one followed closely upon the other in the Nebraska Revised Statutes[10]—or of the Nebraska decisions, or of the Nebraska constitution, that complying with the later law would subject one to the penalties of the earlier. The provision of the Nebraska constitution subsequently held to have been violated had been construed (as appears from the opinion below) to preclude only "unreasonable classification" in laws regulating interest. The fact that many other states had passed similar statutes (see fn. 3, p. 6, *supra*) gave good reason to believe that the classification here was not an unreasonable one.[11]

---

[10] The two laws appeared together in a pamphlet entitled "Interest Laws of the State of Nebraska," compiled by the Nebraska Department of Banking in 1960.

[11] On March 11, 1959, prior to the passage of the 1959 Act, the Attorney General of Nebraska had written a letter to a state legislator stating that in his opinion the bill contained invalid classifications. Between March 14 and March 18, 1959, four Nebraska law firms advised the legislature of their contrary opinions. Nebraska Legislative Journal, 1959, p. 1043, and opinions of Marti, O'Gara, Dalton & Sheldon, of Lincoln, Neb., Viren, Emmert, Hilmes & Gunderson of Omaha, Kennedy, Holland, DeLacy & Svoboda of Omaha, and Swarr, May, Royce, Smith, Andersen & Ross of Omaha. Even on the unlikely assumption that persons subject to a statute (or a series of statutes) plain upon its face, are deemed to be familiar with such informal and unauthoritative pronouncements, the aura of indefiniteness would not have been removed. In any event, the Attorney General's opinion did not state that conduct which would not otherwise have violated the 1941 law would do so because of its compliance with the 1959 bill.

Thus, "men of common intelligence" could not have foretold, between 1959 and 1963, that to comply with the 1959 law would subject them to penalties and forfeitures.

This Court has held that the void for vagueness doctrine applies to statutes which become vague by reason of judicial construction. *Smith* v. *Cahoon*, 283 U.S. 553, 564-565. In *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, a finding of vagueness was based upon the state court's construction of a series of statutory and constitutional provisions which left "the acutest commercial mind" (234 U.S. at 223) uncertain as to what was and was not unlawful. In the instant case, the acutest commercial mind, guided by the acutest legal mind, would not have been able to predict from a reading of all the Nebraska statutes on the subject that the Nebraska law governing transactions occurring prior to June 28, 1963, would have been what the Nebraska Court has held it to be in this case—that conduct which otherwise would not have violated the 1941 act became unlawful because of compliance with the act of 1959. The most cautious businessman, acting upon the best legal advice obtainable, could have done no better than attempt to avoid violation of the 1959 Installment Sales Act by complying with it and of the 1941 Installment Loan Act by making sure that his transaction was not a loan within the meaning of that statute as it had been interpreted, but an installment sale to which that Act did not apply. He would not suspect that compliance with the later law would cause transactions not otherwise subject to the earlier statute to fall within its penalties.

Since between the enactment of the 1959 act and the decision below, no person of common intelligence would have read the 1941 act as forbidding the transactions here involved, the application of that statute to such transactions

is contrary to the principle upon which the void for vagueness doctrine rests, and is accordingly contrary to the due process of law guaranteed by the Fourteenth Amendment.

CONCLUSION.

The granting of this petition for certiorari is justified because of (1) the importance of the question decided below as demonstrated by the tremendous number of transactions invalidated, and (2) the serious breach of the requirement of fairness embodied in the due process clause resulting from the imposition of penalties upon all of the law-abiding members of the installment retail and finance industries in an entire State for conduct they could not reasonably have known to be unlawful.

Respectfully submitted,

ROBERT L. STERN,
231 South La Salle Street
Chicago, Illinois

MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT

CLARENCE A. DAVIS,
525 Stuart Building
Lincoln 8, Nebraska

DAVIS, THONE, BAILEY & POLSKY

APPENDIX A

NEBRASKA CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(a) Article III, Section 18 of the Constitution of Nebraska provides in part:

> "The Legislature shall not pass local or special laws in any of the following cases, that is to say:
>
> • • •
>
> "Regulating the interest on money."

(b) Nebraska Installment Loan Act, Laws 1941, c. 90, Section 15, p. 350, as amended, Laws 1943, c. 107, Section 3, p. 370, Laws 1957, c. 193, Section 1, p. 684, as published in Rev. Stat. of Neb. 1943, Reissue of 1960, Section 45-137, reads as follows:

> 45-137. Installment loans; loans not exceeding three thousand dollars; charges permitted; computation; violation; penalty. (1) Every licensee hereunder may make loans, not exceeding three thousand dollars in principal amount, and may contract for and receive thereon charges at a rate not exceeding thirty-six per cent per annum on that part of the unpaid principal balance on any loan not in excess of one hundred and fifty dollars, thirty per cent per annum on that part of the principal balance on any loan in excess of one hundred and fifty dollars and not in excess of three hundred dollars, and nine per cent per annum on any remainder of such unpaid principal balance. No licensee shall induce or permit any person, nor any husband and wife jointly, or severally to become obligated directly, contingently, or both, under more than one contract of loan at the same time, for

the purpose of obtaining a higher rate of charge than would otherwise be permitted by this section. Charges on loans made under sections 45-114 to 45-155, shall not be paid, deducted, or received in advance.

(2) The charges, as referred to in subsection (1) of this section, shall not be compounded; *Provided,* that if part or all of the consideration for a loan contract is the unpaid principal balance of a prior loan, then the principal amount payable under such loan contract may include any unpaid charges on the prior loan which have accrued within sixty days before the making of such loan contract. Such charges shall (a) be computed and paid only as a percentage per month of the unpaid principal balance or portions thereof, (b) be so expressed in every obligation signed by the borrower, and (c) be computed on the basis of the number of days actually elapsed. For the purpose of computing charges, whether at the maximum rate or less, a month shall be any period of thirty consecutive days and the rate of charge for each day shall be one-thirtieth of the monthly rate. In addition to the charges herein provided for, and in subsection (1) of this section, no further or other amount whatsoever shall be directly or indirectly charged, contracted for, or received. If any amount, in excess of the charges permitted by said sections, referred to in either subsection (1) or (2) of this section, is charged, contracted for, or received, except as the result of an accidental and bona fide error of computation, the contract of loan shall be void. The licensee shall also have no right to collect or receive any principal, interest, or charges whatsoever and the licensee and the several members, officers, directors, agents, and employees thereof, who shall have participated in such violation, shall be guilty of a misdemeanor and upon conviction thereof, shall be punishable by a fine of not more than one thousand dollars and not less than one hundred dollars, by imprisonment of not more than six months, or by both such fine and imprisonment, in the discretion of the court.

Source: Laws 1941, c. 90, § 15, p. 350; C.S.Supp., 1941, § 45-143;

(c) Nebraska Installment Sales Act, Laws 1959, c. 218, p. 753, Rev. Stat. of Neb. 1943, Reissue of 1960, Sections 45-301 to 45-312, insofar as here pertinent, provides:

45-301. Act; how cited. Sections 45-301 to 45-312 may be cited as the Nebraska Installment Sales Act.

Source: Laws 1959, c. 218, § 1, p. 753.

45-302. Terms, defined. When used in sections 45-301 to 45-312, unless the context otherwise requires:

(1) Goods shall mean all personal property including motor vehicles. Goods shall not include money or things in action but shall include goods which, at the time of sale or subsequently are so affixed to realty as to become part thereof whether or not severable therefrom.

(2) Motor vehicle shall mean any automobile, mobile home, motorcycle, truck, trailer, semitrailer, or truck-tractor primarily designed or used to transport persons or property on a public highway, road or street.

(3) Retail buyer or buyer shall mean a person who buys goods from a retail seller under a retail installment contract and not for the purpose of resale.

(4) Retail seller or seller shall mean a person engaged in the business of selling goods to a retail buyer under a retail installment contract.

(5) Retail installment contract or contract shall mean an agreement evidencing a retail installment sale entered into in this state pursuant to which a buyer promises to pay in one or more deferred installments the time sale price of goods and pursuant to which the title to or a lien upon the goods is retained or taken by the seller as security for the payment of the retail installment contract. The term in-

cludes a conditional sale contract, a chattel mortgage, a lien instrument, or a bailment or leasing by which the bailee or lessee contracts to pay a sum substantially equivalent to the value of the goods and by which it is agreed the bailee or lessee is bound to become or has the option of becoming the owner of such goods.

(6) Cash sale price shall mean the price stated in a retail installment contract for which the seller would have sold to the buyer and the buyer would have bought from the seller goods which are the subject matter of the contract, if such sale had been a sale for cash instead of a time sale. The cash price may include, if itemized, any taxes, registration, certificate of title and license fees and costs for accessories and for the installation, delivery or servicing of goods.

(7) Basic time price shall mean the cash sale price of the goods which are the subject matter of the contract plus the amount, if any, included in the contract if a separate identified charge is made therefor, for insurance, minus the buyer's down payment in money or goods.

(8) Time price differential shall mean the amount, as limited herein, to be added to the basic time price.

(9) Time sales price shall mean the total of the cash sale price of the goods, plus the amount, if any, included for insurance, if a separate identified charge is made therefor, and the time price differential.

(10) Sales finance company shall mean a person engaged, in whole or in part, in the business of purchasing retail installment contracts from one or more sellers. The term includes but is not limited to a bank, trust company, investment company, savings and loan association or installment loan licensee, if so engaged.

(11) Director shall mean the Director of Banking.

Source: Laws 1959, c. 218, § 2, p. 753.

45-303. Installment contract; requirements. Each retail installment contract shall be in writing, shall be signed by both the buyer and the seller and shall

contain the following items and a copy thereof shall be delivered to the buyer at the time the instrument is signed, except for contracts made in conformance with section 45-307: (1) The cash sale price of the goods; (2) the amount of the buyer's down payment, and whether made in money or goods, or partly in money and partly in goods, including a brief description of any goods traded in; (3) the difference between subdivisions (1) and (2) of this section; (4) the amount, if any, included for insurance if a separate charge is made therefor, specifying the types of coverages; (5) the basic time price, which is the sum of subdivisions (3) and (4) of this section; (6) the time price differential; (7) the amount of the time price balance, which is the sum of subdivisions (5) and (6) of this section, payable in installments by the buyer to the seller; (8) the number, amount and due date or period of each installment; and (9) the time sales price.

The above items need not be stated in the sequence or order set forth above. Additional items may be included to explain the computations made in determining the amount to be paid by the buyer. No retail installment contract shall be signed by the buyer or proffered by seller when it contains blank spaces to be filled in after execution except, that if delivery of the goods is not made at the time of the execution of the contract, the identifying numbers or marks of the goods, or similar information, and the due date of the first installment may be inserted in the contract after its execution.

Upon written request from the buyer the holder of a retail installment contract shall give or forward to the buyer a written statement of the dates and amounts of payments and the total amount unpaid under such contract. A buyer shall be given a written receipt for any payment when made in cash.

After payment of all sums for which the buyer is obligated under a contract, the holder shall deliver or mail to the buyer at his last-known address one or more good and sufficient instruments to acknowledge payment in full and shall release all security in the goods and mark "canceled" and return to the buyer all original instruments or instruments signed by him.

Source: Laws 1959, c. 218, § 3, p. 755.

45-304. Insurance; policy; cancellation; premium refund. The amount, if any, included for insurance, which may be purchased by the holder of the contract, shall not exceed the applicable premium rates chargeable in accordance with filings, if any, with the Department of Insurance. If dual interest insurance on the goods is purchased by the holder it shall, within thirty days after execution of the retail installment contract, send or cause to be sent to the buyer a policy or policies or certificate of insurance, written by an insurance company authorized to do business in this state, clearly setting forth the amount of the premium, the kind or kinds of insurance, the coverages and all the terms and conditions of the contract or contracts of insurance. If any insurance is canceled, or the premium adjusted, any refund of the insurance premium plus the unearned time price differential thereon received by the holder shall be credited to the next maturing installments of the contract except to the extent applied toward payment for similar insurance protecting the interests of the buyer and the holder or either of them.

Source: Laws 1959, c. 218, § 4, p. 756.

45-305. Price differential; schedule. (1) Notwithstanding the provisions of any other law, the time price differential shall not exceed the following schedule:

(a) As to motor vehicles:

CLASS 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made—eight dollars per one hundred dollars per year.

CLASS 2. Any new motor vehicle not in Class 1 and any used motor vehicle designated by the manufacturer by a year model of the same or not more than two years prior to the year in which the sale is made—ten dollars per one hundred dollars per year.

CLASS 3. Any used motor vehicle not in Class 2 and designated by the manufacturer by a year model not more than four years prior to the year in which the sale is made—thirteen dollars per one hundred dollars per year.

CLASS 4. Any used motor vehicle not in Class 2 or Class 3 and designated by the manufacturer by a year model more than four years prior to the year in which the sale is made—fifteen dollars per one hundred dollars per year.

(b) As to goods other than motor vehicles: (i) On so much of the basic time price as does not exceed three hundred dollars, twelve dollars per one hundred dollars per year; (ii) if the basic time price exceeds three hundred dollars, but is one thousand dollars or less, ten dollars per one hundred dollars per year on that portion over three hundred dollars; and (iii) if the basic time price exceeds one thousand dollars, eight dollars per one hundred dollars per year on that portion over one thousand dollars.

(2) When the retail installment contract is payable in substantially equal and consecutive monthly installments, the time price differential in subsection (1) hereof shall be computed on the basic time price of each contract, as determined in section 45-303, from the date of the contract until the due date of the final installment, notwithstanding that the time price bal-

ance is required to be paid in installments. When the basic time price is less than one hundred dollars and the contract life does not exceed twelve months, a time price differential of seventy-five cents per each five dollars or portion thereof may be charged, received and collected.

(3) When a retail installment contract provides for payment other than in substantially equal and consecutive monthly installments, the time price differential may be at a rate which will provide the same return as is permitted on substantially equal monthly payment contracts under subsections (1) and (2) of this section, having due regard for the schedule of payments.

(4) Every contract payable in two or more installments shall provide for payment of such installments at approximately equal periodic intervals of time and be so arranged that no installment is substantially greater in amount than any preceding installment; *Provided*, that in order to facilitate payment in accordance with the buyer's seasonal or intermittent income a contract may reduce or omit payments over any period or periods in which the buyer's income is reduced or suspended.

Source: Laws 1959, c. 218, § 5, p. 756.

* * *

45-310. Failure to obtain license; penalty. Any person who shall violate any provision of sections 45-301 to 45-312 or engage in the business of a sales finance company in this state without a license therefor as provided in sections 45-301 to 45-312 shall be guilty of a misdemeanor and shall, upon conviction, thereof, be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months, or both.

Source: Laws 1959, c. 218, § 10, p. 760.

45-311. Charges in excess of act: penalty for overcharge. If any seller or sales finance company, in the making or collection of an installment contract shall, directly or indirectly, contract for, take, or receive charges in excess of those authorized by sections 45-301 to 45-312, such contract shall be void and uncollectible as to (1) all of the excessive portion of the time price differential, (2) the first one thousand dollars on the time price differential authorized by section 45-305, and (3) the first four thousand dollars of the principal of the contract. If any seller or sales finance company violates any provision of sections 45-301 to 45-312, other than the violations described above, except as a result of an accidental and bona fide error, such installment contract shall be void and uncollectible as to the first five hundred dollars of the time price differential and the first one thousand dollars of the principal of such contract. If any of such money has been paid by the buyer, such buyer or his assignee may recover under sections 45-301 to 45-312 in a civil suit brought within one year after the due date, or any extension thereof, of the last installment of the contract.

Source: Laws 1959, c. 218, § 11, p. 760.

APPENDIX B

---

175 Neb. 483, 122 N.W. 2d 528

William F. ELDER and Helen E. Elder,
Appellants,

v.

Thomas C. DOERR, Appellee.

No. 35484.

Supreme Court of Nebraska.

June 28, 1963.

Heard before WHITE, C. J., and CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH and BROWER, JJ.

CARTER, *Justice.*

Plaintiffs bring this action for a declaratory judgment to determine their rights in a retail motor vehicle installment contract and for injunctive relief. Issues were made up by the pleadings and a trial was had. The trial court found for the defendant and the plaintiffs have appealed.

The evidence discloses that on March 31, 1962, plaintiffs purchased a 1959 automobile from an Omaha dealer under a retail installment contract which was subsequently assigned to the defendant. The dealer informed the plaintiffs that the cash sale price of the automobile was $2,095. The trade-in value of their old car and the cash down payment amounted to $660, leaving an amount due of $1,435 if the car was sold for the cash price. The dealer advised plaintiffs that the time sale price of the automobile was $2,352.96 and, after crediting the $660 thereon, the unpaid balance of the time price would be $1,692.96.

which could be paid off in 24 monthly installments of $70.54 each. The plaintiffs accepted the time sale offer. The parties executed a retail motor vehicle installment contract in accordance therewith which is the subject of this action.

It was stipulated by the parties that the time sale differential is $257.96 and that this amount is less than the maximum time price differential authorized by the Nebraska Installment Sales Act (sections 45-301 to 45-312, R.R.S. 1943). It is also stipulated that the amount of $257.96 is in excess of an amount equal to 9 percent per annum on the unpaid balance if each payment is made in the manner and at the time scheduled. It is further stipulated that the sale and contract complied with all the requirements of the Nebraska Installment Sales Act.

The plaintiffs allege that the installment contract is void in that it violates the Nebraska Installment Loan Act (sections 45-114 to 45-158, R.R.S. 1943); that the Nebraska Installment Sales Act is unconstitutional in that it violates Article I, section 16, and of Article III, section 18, of the Nebraska Constitution; that the plaintiffs have notified the defendant they will make no further payments under the installment contract; and that defendant has threatened to repossess plaintiffs' automobile. A copy of the contract is attached to and made a part of the petition. Plaintiffs pray that the Nebraska Installment Sales Act be declared unconstitutional; that the contract be adjudged void and canceled; and that the defendant be enjoined from attempting to enforce the contract. The defendant alleges that the Nebraska Installment Sales Act is constitutional, but even if it is not, the transaction was a valid time sale and not in violation of the Nebraska Installment Loan Act.

The plaintiffs allege that the installment contract is void because it violates the Nebraska Installment Loan Act. Defendant contends the installment contract is valid in that it complies with all the requirements of the Nebraska Installment Sales Act and, further, that it is a time sale made in good faith and is valid whether or not the Nebraska Installment Sales Act is constitutional. The first question to be determined is whether or not the installment contract is valid irrespective of the constitutionality of the Nebraska Installment Sales Act.

In the determination of this case we must give consideration to the right of property and its incidents as guaranteed by Article I, sections 1 and 25, of our state Constitution. This court has held that these provisions give to every citizen the right of acquiring the absolute and unqualified title to every species of property with all rights incidental thereto, including the right to dispose of such property in such innocent manner as he pleases and to sell it at such a price as he can obtain for it in fair barter. *State ex rel. English* v. *Ruback*, 135 Neb. 335, 281 N.W. 607; *Nelsen* v. *Tilley*, 137 Neb. 327, 289 N.W. 388, 126 A.L.R. 729. See, also, 55 Am. Jur., Usury, s. 21, p. 338. The right to engage in a lawful and useful occupation, however, may be subjected to reasonable regulation in the public interest, even though it results in some degree of limitation on the rights of property. In *Althaus* v. *State*, 99 Neb. 465, 156 N.W. 1038, this court upheld a legislative act requiring the licensing of money lenders and authorizing licensed money lenders to charge a brokerage fee in excess of the maximum rate of interest authorized by law, and in certain specified cases to charge an examination fee of 50 cents in addition to interest. The licensing of money lenders and the regulation of interest is there held to be within the police power of the state. See, also, *Mack Investment Co.* v. *Dominy*, 140 Neb. 709, 1 N.W. 2d 295.

But this court has adhered to the principle that the Legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly.

Pursuant to this fundamental concept this court has recognized the right of an owner of a motor vehicle to sell it for what he can get for it in fair barter, even though the whole or a part of the purchase price may be on credit. In a line of cases beginning with *Grand Island Finance Co.* v. *Fowler*, 124 Neb. 514, 247 N.W. 429, to the present time, this court has consistently held that a time sale made in good faith at a price in excess of a cash price, even though the difference between the two prices exceeds the lawful interest for a loan, is not invalid as usurious. We adhere to the fundamental principle that a seller may sell his property for what he can get for it so long as the transaction is a sale and purchase made in good faith. See, *Trailmobile, Inc.* v. *Hardesty*, 173 Neb. 46, 112 N.W. 2d 535; *Berg* v. *Midwest Laundry Equipment Corp.*, 175 Neb. 423, 122 N.W. 2d 250.

Difficulties arise in this class of cases when the transaction appears to be a time sale made in good faith but is in fact a loan at a usurious rate of interest. Many see no practical difference in a time sale and a cash sale with interest on the portion on which credit is extended. It is the result of the fact that a purchaser may desire to pay a larger sum to gain time and a vendor may prefer payment of a specified sum in cash to a larger amount in expectancy. The courts are confronted with the problem of maintaining the fundamental right of property on the one hand and the law against usury on the other. The general rule is that a sale of property for a price fixed by the seller and accepted by the purchaser, if made in

good faith, does not involve any question of usury. It is only when it is shown that such a transaction is a scheme, or artifice, to avoid the usury laws that the courts will look through form and determine the real nature of the transaction.

Since the true nature of such financial transaction can only be determined by the evidence in each particular case, uncertainty has arisen in a field where certainty is desired. This court has consistently held that an installment time sale which is in fact a loan is void if it is made in violation of the Nebraska Installment Loan Act. It is a question of fact as to whether or not a particular transaction is a time sale made in good faith or the financing of the unpaid balance of a cash purchase price. *Powell* v. *Edwards*, 162 Neb. 11, 75 N.W. 2d 122; *Trailmobile, Inc.* v. *Hardesty*, *supra*. In considering whether or not such a transaction is a time sale made in good faith or a loan, the court will look through form and examine its substance. *State ex rel. Beck* v. *Associates Discount Corp.*, 168 Neb. 298, 96 N.W. 2d 55. A transaction is not a valid time sale made in good faith unless the seller informs the buyer, at the time of the sale, of the cash and time sale prices and gives the buyer the opportunity to choose the one he will accept. *Wood* v. *Commonwealth Trailer Sales, Inc.*, 172 Neb. 494, 110 N.W. 2d 87. The fact that a purchaser has full knowledge and accepts the terms of the proffered sale is not a defense to a charge of usury. The lender alone is the violator of the law, and against him alone are its penalties exacted. *Robb* v. *Central Credit Corp.*, 169 Neb. 505, 100 N.W. 2d 57.

The defendant contends that the burden is upon the plaintiffs to show that the transaction was not a time sale made in good faith and was in fact a loan. The stipulation of facts upon which the case was tried is silent on

this question and would ordinarily require a holding that the installment contract was a valid time sale made in good faith. But the parties stipulated that the installment contract was made in conformity with all the requirements of the Nebraska Installment Sales Act. If the latter act provides for interest in excess of the maximum that a nonlicensee could charge under the Nebraska Installment Loan Act, it would be a violation of that act if the Nebraska Installment Sales Act is unconstitutional. The plaintiffs rely solely on the provisions of the Nebraska Installment Sales Act itself, with which full compliance is stipulated; to show the usurious nature of the installment contract. The parties recognized this fact when they stipulated that an actual and justiciable controversy exists with reference to the constitutionality of the Nebraska Installment Sales Act. It stands to reason that the time differential could not be an interest charge under the Nebraska Installment Sales Act, and something different when applied to the Nebraska Installment Loan Ac We think the crux of the case is whether or not the time differential provided for in the Nebraska Installment Sales Act was in fact an interest charge for the loan of money or the forbearance of a debt. We therefore reach the question: Was the price differential permitted by the Nebraska Installment Sales Act in fact an interest charge?

The purpose of the Nebraska Installment Sales Act is twofold, first, to insure a reasonable return to money lenders on installment sales contracts where, admittedly, a reasonable return in all cases cannot be had within existing usury statutes and, second, to protect retail installment buyers from exorbitant gouging by greedy money lenders. Traditionally, time sales have not been held to be within the usury acts on the theory that the increase in the time sale price differs from interest on a loan. The Legislature

undoubtedly recognized that the exclusion of a time sales contract from the operation of usury statutes left consumers without protection against exorbitant finance charges.

By section 45-303, R.R.S. 1943, of the Nebraska Installment Sales Act, it is provided that each retail installment contract shall be in writing, shall be signed by both the buyer and the seller, and shall set forth the cash sale price, the time sales price, and the time price differential, among others. By section 45-305, R.R.S. 1943, of the act, it is provided that the time price differential shall not exceed the following schedule:

"CLASS 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made—eight dollars per one hundred dollars per year.

"CLASS 2. Any new motor vehicle not in Class 1 and any used motor vehicle designated by the manufacturer by a year model of the same or not more than two years prior to the year in which the sale is made—ten dollars per one hundred dollars per year.

"CLASS 3. Any used motor vehicle not in Class 2 and designated by the manufacturer by a year model not more than four years prior to the year in which the sale is made—thirteen dollars per one hundred dollars per year.

"CLASS 4. Any used motor vehicle not in Class 2 or Class 3 and designated by the manufacturer by a year model more than four years prior to the year in which the sale is made—fifteen dollars per one hundred dollars per year."

The general statute fixing maximum interest rates in this state provides: "Any rate of interest which may be agreed upon, not exceeding nine dollars per year upon one

hundred dollars, shall be valid upon any loan or forbearance of money, goods or things in action * * *." S. 45-101, R.S. Supp., 1961. See, also, *Peters Trust Co.* v. *Hecht*, 118 Neb. 390, 224 N.W. 866.

The Nebraska Installment Sales Act provides that the cash sale price may include, if itemized, any taxes, registration, certificate of title and license fees and costs for accessories and for the installation, delivery or servicing of goods. The basic time price is defined as the cash sale price of the goods, plus the charge for insurance, less the down payment made in money or goods. The price differential means the amount, as limited by the statute, to be added to the basic time price. The time sale price is defined as the total of the cash sale price of the goods, plus the amount for insurance, and the time price differential. Section 45-302, R.R.S. 1943. No charge for insurance is involved in the present case.

The pertinent provision is the one providing for the addition of the time price differential into the time sale price. This differential is the amount permitted to be added by the schedule provided in section 45-305, R.R.S. 1943, which we have hereinbefore quoted in part. As an example, it is provided in Class 2 of the schedule that the time differential shall not exceed "ten dollars per one hundred dollars per year." This provision does not specify the basis for the allowance of this amount as a part of the time sale price. It is, however, similar to the language quoted in the general statute fixing the maximum rate of interest that may be charged, to wit, "not exceeding nine dollars per year upon one hundred dollars." The only logical conclusion that can be reached is that the price differential was for the forbearance of money and is, in fact, an interest charge. Since it is stipulated that the amount of the differential is in excess of an amount equal to nine percent

per annum simple interest on the scheduled unpaid balances if each payment were made at the time scheduled, it would appear to be in violation of the Nebraska Installment Loan Act. But the defendant contends that the installment contract meets all the requirements of the Nebraska Installment Sales Act and is therefore valid and enforcible irrespective of the provisions of the Nebraska Installment Loan Act. For us to so hold would permit a usurious loan under the Nebraska Installment Loan Act to become valid by the simple expedient of complying with form irrespective of substance. In any event, this gives rise to the question whether or not compliance with the Nebraska Installment Sales Act has the effect of defeating a claim of usury under the Nebraska Installment Loan Act. If the Nebraska Installment Sales Act is unconstitutional, such an issue is not available to the defendant.

The fixing of interest rates by the Legislature is a classic example of the exercise of the police power in the public interest. It is a power that has been traditionally exercised by the Legislatures of the several states and we shall not at this time undertake to set forth authorities for legislative action in this field. But if, as we hold, the Legislature has fixed interest rates by the schedule contained in section 45-305, R.R.S. 1943, we cannot say it did not act within its legislative power since it has the authority to fix interest rates in the exercise of the police power. *Althaus* v. *State*, 99 Neb. 465, 156 N.W. 1038. The question is whether or not it exercised its power within constitutional limitations.

Article III, section 18, of the Constitution provides in part: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Regulating the interest on money." Under this section of the Constitution, the Legislature may fix the rates

of interest that may be charged for the hire of money or the forbearance of debt in installment sale contracts, if the classification is reasonable and has relation to the public interest. That a reasonable classification is required in this type of case is made clear in *Althaus* v. *State*, 99 Neb. 465, 156 N.W. 1038, wherein it is said: "The law assailed regulates the interest chargeable by two classes—unlicensed lenders of money limited to 10 per cent. per annum, and licensed lenders authorized to make an additional charge, called a 'brokerage fee,' not exceeding one-tenth of the money actually lent and, in exceptional cases, to charge an examination fee of 50 cents. The latter class is open to all who comply with the terms of the statute. One class of borrowers may be required to pay more for their loans than others, but this condition already existed and was not created by legislation. The lawmakers recognized a class of borrowers from whom exorbitant rates of interest had been exacted under existing conditions and attempted to afford them some measure of protection. Those making such loans are required to obtain a license. Their methods of doing business are regulated. The act makes no discrimination against any class of borrowers. It is not unconstitutional as being a 'local or special law * * * regulating the interest on money.' The better rule is that the classification is neither unreasonable nor arbitrary. It is also clear that the act does not deny the equal protection of the laws."

In the last-cited case the classification of all lenders of money in the licensed and unlicensed classes for the purpose of fixing and regulating interest rates was held to be a reasonable classification for that purpose. In the instant case the classification was further broken down into classes of automobiles based on their ages. This furnishes no reasonable classification for the purpose of regu-

lating interest. See, also, *Althaus* v. *State*, 94 Neb. 780, 144 N.W. 799. While it is true that motor vehicles may constitute a reasonable class for some purposes as a basis for legislation in the public interest, it does not permit such class to be broken into four separate classes to provide a different rate of interest for each on credit extended. The age of a motor vehicle affords no reasonable classification for the fixing of maximum rates of interest that may be charged on installment contracts given for the unpaid portion of the purchase price. The quoted constitutional provision contemplates that a legislative act fixing maximum rates of interest shall operate uniformly upon a class of persons or property and that such class shall be reasonable and in the public interest. *Allan* v. *Kennard*, 81 Neb. 289, 116 N.W. 63; *Steinacher* v. *Swanson*, 131 Neb. 439, 268 N.W. 317; *Creigh* v. *Larsen*, 171 Neb. 317, 106 N.W.2d 187.

It is here contended that the fixing of maximum rates of interest for installment sales of automobiles at one amount and for different rates on installment contract sales of all other kinds of personal property constitutes an improper classification for the purpose of fixing maximum rates of interest. It is contended that the lender of money on automobiles under the Nebraska Installment Sales Act accords such lender a special privilege and is, in fact, a special law. We fail to see any reasonable basis for classifying personal property for the purpose of fixing interest rates so that an installment contract on one species of personal property would be lawful and on a similar species of property would be usurious. This question was decided in *Althaus* v. *State*, 94 Neb. 780, 144 N.W. 799, in which we said: "A lender who charges extortionate interest and accepts security on the chattels enumerated by

the legislature may be punished. Another lender who makes a loan on identical terms, except that he includes in his chattel mortgage an article not enumerated in the act, but similar to those mentioned therein, goes free. If the avarice and greed of those who thrive on the poverty or the misfortune of the owners of 'household goods, musical instruments, wearing apparel, jewelry, diamonds, or by a deposit of personal property, or by an assignment of wages, credits or choses in action,' are to be wisely and justly curbed by law as such abominations should be, why should not the law apply also to those who lend money on other chattels of a similar nature? * * In the eye of the law, why should the owner of household goods, which are being moved from one tenement to another, be protected by statute from the extortion of the lender on chattel security, while the owner of the cart in which such goods are moved is left to the unpunishable avarice of the chattel lienor? * * * In a law regulating the interest on money are the classifications made in the act permitted by the constitution? The answer to these questions is that there is no 'substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified.' Reasoning or refinement which would harmonize such classifications with the constitution would make of the supreme law, of the act of the legislature and of the judgment of the court a farce or a delusion. * * * The classifications are on their face unreasonable and arbitrary. The act is the kind of legislation the constitution was intended to prohibit." See, also, *State ex rel. Sorensen* v. *First State Bank of Alliance*, 122 Neb. 109, 239 N.W. 646, 648.

The constitutional provision inhibiting special legislation in regulating the interest on money means that maximum interest rates shall be made by general law on a reasonable classification of persons or things, and to prevent legislation affecting diversely property of like character and persons similarly situated. The Nebraska Installment Sales Act is not in compliance with this constitutional concept and it is void for that reason. *State ex rel. Dawson County* v. *Farmers & Merchants Irrigation Co.*, 59 Neb. 1, 80 N.W. 52.

We conclude that the classification of property in the Nebraska Installment Sales Act for the purpose of fixing maximum rates of interest on installment sales contracts given in payment of the unpaid purchase price is unreasonable, arbitrary, and capricious, and in violation of Article III, section 18, Constitution of Nebraska, prohibiting special legislation. The act does not operate uniformly on the persons and property in the class sought to be regulated. The classification of persons and property for the purpose of fixing interest rates on installment loans thereon is unreasonable, arbitrary, and void. The Nebraska Installment Sales Act is in violation of Article III, section 18, Constitution of Nebraska, and is of no force and effect.

Since the seller of the automobile involved in the transaction, and who appears on the installment sales contract as the seller, is not a licensee, the maximum rate of interest that could be charged is 9 percent per annum. The parties having stipulated that the time differential, which is in fact interest, exceeds that amount, the installment sales contract is in fact a loan and in violation of the Nebraska Installment Loan Act and void.

The judgment of the trial court is reversed and the cause remanded to the district court with instructions to enter judgment in accordance with this opinion.

Reversed and remanded with directions.

BOSLAUGH, Justice (dissenting).

I respectfully dissent from the holding of the majority in this case.

The pleadings and the evidence in this case present a question as to the validity of a retail installment contract for the sale of an automobile. The constitutionality of the Insfallment Sales Act is not an issue in the case unless it is necessary to a decision of the case. The conclusion of a pleader alone cannot raise such an issue.

The Installment Sales Act was intended to regulate valid time sales. The act is not applicable to transactions which in fact are loans made in violation of the Installment Loan Act. Consequently, if the retail installment contract involved in this case was not a valid time sale, then the Installment Sales Act is not involved and its constitutionality cannot be an issue in this case.

If the retail installment contract involved in this case is in fact a time sale made in good faith, then it is valid under *Grand Island Finance Co.* v. *Fowler*, 124 Neb. 514, 247 N.W. 429, which, apparently, is still the law in this state. In that event, the constitutionality of the Installment Sales Act cannot be an issue because the contract is valid without regard to the statute.

In any event, the plaintiffs cannot challenge the constitutionality of the Installment Sales Act because their rights are not affected adversely in any way by the act. The

Installment Sales Act imposes controls and limitations upon the seller and creates rights and benefits for the purchaser. In the absence of the statute there is no regulation of time sales made in good faith.

Generally, a statute will not be declared unconstitutional at the suit of a party whose rights are not affected injuriously by the operation of the statute. *Johnson Fruit Co.* v. *Story*, 171 Neb. 310, 106 N.W.2d 182; *Hanson* v. *City of Omaha*, 157 Neb. 403, 59 N.W.2d 622; *State ex rel. Nelson* v. *Butler*, 145 Neb. 638, 17 N.W.2d 683; *Erickson* v. *Nine Mile Irr. Dist.*, 109 Neb. 189, 190 N.W. 573, 192 N.W. 694; *Urbach* v. *City of Omaha*, 101 Neb. 314, 163 N.W. 307, L.R.A.1917E, 1163; *Peterson* v. *Anderson*, 100 Neb. 149, 158 N.W. 1055; *State ex rel. Ridgell* v. *Hall*, on rehearing, 99 Neb. 95, 156 N.W. 16; *Cram* v. *Chicago, B. & Q Ry. Co.*, 85 Neb. 586, 123 N.W. 1045, 26 L.R.A.,N.S., 1022; *State* v. *Brandt*, 83 Neb. 656, 120 N.W. 196.

For these reasons I dissent from the holding of the majority in this case.

APPENDIX C

EXCERPTS FROM MOTION FOR REHEARING IN THE SUPREME COURT OF NEBRASKA WHICH PRESENT THE FEDERAL QUESTIONS

[p. 4] XII.

The decision of the Court invalidating a reasonable classification and differentiation of treatment by the Nebraska legislature between loans of money and installment sales of goods, and in ignoring the strong presumption in favor of validity of a legislative act and in ignoring the fundamental proposition that a statute should be so construed as to uphold and avoid doubts as to its constitutionality but on the contrary straining all rules of logic and reasoning to find the act unconstitutional is so surprising and in such contrast to existing law as to be "unreasonable, arbitrary and capricious" and to deny to the Appellee the equal protection of the laws and constitutes a taking of Appellee's property without due process of law contrary to the 14th Amendment to the Constitution of the United States of America.

XIII.

The decision of the Court finding that the legislative regulation of the time price differential in an installment sale of goods constitutes a regulation of interest charges and in applying the provisions of a statute which the Court holds to be unconstitutional to convert a time price differential on an installment sale of goods into a charge for interest is so unexpected, unusual and so at variance with well settled law as to be "unreasonable, arbitrary and capricious" and so contrary to prior decisions of the Supreme Court of the United States, the Supreme Court

of Nebraska, and the jurisprudence of every American jurisdiction as to violate fundamental concepts of justice and constitutes a denial to Appellee of the equal protection of the laws and a taking of Appellee's property without due process of law contrary to the 14th Amendment to the Constitution of the United States of America.

XIV.

The decision of the Court holding the contract owned by the Appellee to be void under the Nebraska Installment Loan Act when in truth and in fact no loan was ever made or intended and the contract arose out of a sale of merchandise on an installment plan and this notwithstanding that the Nebraska Installment Loan Act by its terms applies only to loans of money and to persons engaged in the lending of money, and does not apply to an installment sale of goods, an installment seller, or an assignee of an installment sales contract, all of which the legislature sought to regulate and control by the Nebraska Installment Sales Act, is so unexpected, surprising and at variance with long settled legal principles as to be "unreasonable, arbitrary, and capricious", and to deny the Appellee the equal protection of the laws and to constitute a taking of Appellee's property without due process of law contrary to the 14th Amendment to the Constitution of the United States of America.

XV.

The decision of the Court holding that "a dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference may exceed lawful interest for a loan" and yet at the same time holding a sale stipulated to be such a transaction and which also complied with an Installment Sales Act subsequently declared

to be unconstitutional, to be void under an Installment Loan law so that the purchaser is entitled to retain the property acquired under the contract and to recover back all payments made under the contract, is so illogical on its face and is so "unreasonable, arbitrary and capricious" and such an "arbitrary exercise of judicial power" as to be in clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection of private rights and constitutes a denial to the Appellee of the equal protection of the laws and a taking of Appellee's property without due process of law contrary to the 14th Amendment to the Constitution of the United States of America and further constitutes an impairment of the obligations of Appellee's contract in violation of Article I, Section 10 of the Constitution of the United States of America.

* * * * *

[p. 36] VII.

The Federal Questions

It is not my purpose at this time to thoroughly brief an argument on the Federal questions that are obvious as a result of this decision if it means what many lawyers think.

These questions could not have arisen and did not arise until this opinion was written. Therefore, they could not have been presented any sooner.

We present them now only because this opinion is widely interpreted as making void all time sales contracts in which the time price differential exceeds a 9% interest rate.

Let us be content with saying that the action of a State court is just as much covered by the Fourteenth Amendment as is action of the Legislature and that in my view the decision perhaps violates the contract clause if understood as many think.

In 36 C.J.S., Section 249, it is said:

> "The judgment of a State Court is not subject to review by the United States Supreme Court where the State Court has decided nothing more than that the contract claimed to be impaired is void and never had any legal existence * * * where, however, the judgment of the State Court goes further and gives effect to State legislation which might reasonably be claimed to impair the obligation of a contract which one party claims to exist, the Supreme Court has jurisdiction and may determine for itself the existence, validity and construction of the alleged contract * * *."

If the court is saying that these contracts are invalid because they are "in compliance" with an unconstitutional statute then the case may well fall within the rule just stated.

It is clear that the action of this Court is subject to the same restrictions against the impairment of contracts, due process of law, equal protection of the laws, etc., as is the action of the State Legislature.

In *Shelley* v. *Kraemer*, 334 U.S. 1, 92 Law. Ed. 1161, the Supreme Court of the United States said this:

> "That the action of State Courts and of their judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth amendment, is a proposition which has long been established by decisions of this Court."

And again:

> "It is doubtless true that a state may act through different agencies—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another * * *. The state acts by its legislative, executive or judicial authority. It can act in no other way."

This encompassment of judicial action within the protective clauses of the Fourteenth Amendment raises definitely the question of whether this opinion is in such clear conflict with fundamental principles which have been established in our system of jurisprudence for the protection of private rights as to amount to a denial of equal protection of the law and of due process of law. The due process clause requires general conformity to legal principles fundamental to our system of jurisprudence and is designed to guard against "unreasonable, arbitrary or capricious" state action. This opinion, if it really intends to hold that this contract is void because of a piece of legislation which the court itself has held void, violates these fundamental principles. Furthermore, the application of the penalties of the Installment Loan Act to a transaction which conforms to all of the previous decisions of this Court as a sale amounts to the invoking of unauthorized penalties and forfeitures which also violates fundamental principles.

Likewise a penal statute, which the forfeiture in the Installment Loan Act is, must bear accurate definition just as must a criminal statute before one can be subjected to its penalties. And yet it is only by the holdings of this Court that anyone could possibly be advised in advance that he was violating the penalty sections of the Installment Loan Law when he makes a stipulated sale of personal property.